SUNDRA RAJOO NADARAJAH v. MENTERI HAL EHWAL LUAR NEGARA, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN J
[JUDICIAL REVIEW NO: WA-25-108-03-2019]
26 MARCH 2019

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for leave to commence judicial review proceedings – Seeking prohibition preventing Attorney General from bringing proceedings against applicant in his capacity as Director of the Asian International Arbitration Centre ('AIAC') – Whether applicant, being former High Officer of AIAC, clothed with immunity from prosecution – Whether Attorney General has unfettered discretion in relation to prosecution of criminal offences pursuant to art. 145(3) of the Federal Constitution – Whether decision of Attorney General in exercising discretion to prefer charges against applicant amenable to judicial review – Application for waiver of immunities – Whether immunities would impede course of justice – International Organizations (Privileges and Immunities) Act 1992, s. 8A(2) – Rules of Court 2012, O. 53 r. 3*

The applicant, a Malaysian citizen, was the former Director of Asian International Arbitration ('AIAC'). On 20 November 2018, the applicant was arrested at the Kuala Lumpur International Airport by the Malaysian Anti Corruption Commission ('third respondent') and was detained overnight at the third respondent's premises in Putrajaya. After his release, the applicant was informed that the respondents were obtaining a waiver of the applicant's immunity as former High Officer of AIAC. The applicant was also informed that he will be charged in court for criminal offences. In the circumstances, the applicant filed for leave to commence a judicial review application pursuant to O. 53 r. 3 Rules of Court 2012, seeking, *inter alia*, an order of (i) *certiorari* to set aside any document purporting to waive the applicant's immunity; (ii) prohibition preventing the Attorney General of Malaysia, the second respondent, from laying any charge or bringing any proceedings in any court in Malaysia against the applicant with regard to anything done by the applicant in his capacity as Director of AIAC; and (iii) prohibition preventing the third respondent from arresting, detaining or bringing any judicial proceedings against the applicant with regard to anything done by the applicant in his capacity as Director of AIAC. It was contended that the applicant, being the former High Officer of AIAC, was clothed with immunity from prosecution pursuant to, among others, s. 4 read with Part II of Second Schedule of International Organizations (Privileges and Immunities) Act 1992 and art. III (6) of the Agreement of Government of Malaysia and the Asian-African Legal Consultative Committee ('AALCO'). The respondents, however, submitted that the said immunities could be waived in situations where such privileges and immunities would

impede the course of justice. The main issue that arose herein was whether the decision of the Attorney General in exercising his discretion to prefer any charges against the applicant was amenable to judicial review.

Held (dismissing applicant's application):

(1) Reading the Federal Court case of *Peguam Negara Malaysia v. Chin Chee Kow* in totality, the court undoubtedly acknowledged the unfettered discretion of the Attorney General in relation to the prosecution of criminal offences pursuant to art. 145(3) of the Federal Constitution. Thus, the decision of the Attorney General made in his prosecutorial role was the unfettered discretion of the Attorney General which was not amenable to judicial review. In the context of the present application, the Attorney General had the unfettered discretion to charge the applicant for criminal offence which this court had no legal power to interfere. (paras 18, 19 & 23)

(2) On the issue of the applicant's immunity being the former High Officer of AIAC, the immunities conferred did not cover any act done for the personal benefit of the individual. There were no established facts or evidence for this court to determine as to whether the applicant's action was for his own benefit or otherwise. The evidence, if any, would only be revealed during trial in the court where the applicant was charged with the criminal offence. This court was not privy to the evidence to be produced by the prosecution against the applicant which was pertinent to determine the issue of the applicant's immunity. (paras 28-30)

(3) Based on s. 8A(2) of the International Organizations (Privileges and Immunities) Act 1992, the application for waiver of immunities can be made by the relevant parties but the power to waive the immunities in the present case was with AALCO and one of the considerations to be taken by AALCO was whether the immunities would impede the course of justice. In the circumstances, the issue of waiver of the applicant's immunities had been resolved by the letter from the Secretary General of AALCO to the Minister of Foreign Affairs. (paras 32 & 39)

(4) There was no *prima facie* arguable case in the applicant's application for leave to commence judicial review. The application was therefore frivolous and vexatious. (para 40)

Case(s) referred to:

Ainsbury v. Mallington [1987] 1 All ER 929 ***(refd)***

Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener) [2018] 10 CLJ 129 FC ***(refd)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***

Law Society of Singapore v. Tan Guat Neo Phyllis [2008] 2 SLR 239 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***
Sun Life Assurance Co. of Canada v. Jervis [1944] AC 111 ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 376(1)
Federal Constitution, art. 145(3)
International Organizations (Privileges and Immunities) Act 1992, ss. 4, 8A(1), (2), Second Schedule Part II
Rules of Court 2012, O. 53 r. 3

For the applicant - K Shanmugam, Abd Shukor Ahmad & Nasyrah Samir; M/s Kanesalingam & Co
For the respondents - Narkunavathy Sundareson SFC & Khong Hui Li FC

Reported by Suhainah Wahiduddin

JUDGMENT

Nordin Hassan J:

Introduction

[1] This is the applicant's application for leave to commence a judicial review application pursuant to O. 53 r. 3 of the Rules of Court 2012.

[2] The main reliefs sought by the applicant and confirmed by counsel for the applicant during the hearing of this leave application are the following:

(i) an order of *certiorari* to set aside any document purporting to waive the applicant's immunity as a former High Officer being the former Director of the Asian International Arbitration Centre ('AIAC').

(ii) an order of prohibition preventing the Attorney General of Malaysia, the second respondent, from laying any charge or bringing any proceedings in any court in Malaysia against the applicant with regard to anything done by the applicant in his capacity as Director of AIAC.

(iii) an order of prohibition preventing the Malaysia Anti Corruption Commission, the third respondent, from arresting, detaining, issuing any warrant or other order or otherwise bringing any judicial proceedings whatsoever against the applicant with regard to anything done by the applicant in his capacity as Director of the AIAC.

A **Brief Facts**

[3] The relevant facts in this application are the following:

(i) The applicant is a Malaysian citizen and former Director of AIAC for the period from 1 March 2018 until 21 November 2018.

B (ii) AIAC is located in Malaysia since 1978 pursuant to agreements between Government of Malaysia and the Asian-African Legal Consultative Committee ('AALCO').

(iii) On 20 November 2018, the applicant was arrested at Kuala Lumpur International Airport by the third respondent and was detained
C overnight at the third respondent's premises in Putrajaya.

(iv) On 21 November 2018, the applicant was released from the third respondent's detention after the application to remand the applicant was refused by the Magistrate.

D (v) Further, the applicant was informed that the respondents have tried and continuing to try to obtain a waiver of the applicant's immunity as former High Officer of AIAC particularly from Secretary General of AALCO.

(vi) The applicant was also informed by the third respondent that the
E applicant will be charged in court for criminal offences.

(vii) In the circumstances, the applicant has filed this judicial review application seeking the reliefs mentioned above.

The Applicant's Submission

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[4] Basically, counsel for the applicant contends that the applicant, being the former High Officer of AIAC is clothed with immunity from prosecution pursuant to, among others, s. 4 read with Part II of Second Schedule of International Organizations (Privileges and Immunities) Act 1992 (Act 485) and Article III (6) of the Agreement of Government of Malaysia and
G AALCO dated 26 March 2013.

[5] It was further submitted that there is no provision of the law that allows the applicant's immunity to be removed *ex post facto*.

[6] Counsel of the applicant further argued that the applicant is adversely
H affectedly by the decisions, actions and omission of the respondents and being a person facing an unlawful prosecution. As such, the applicant has established his right to commence judicial review pursuant to O. 53 r. 3 of the Rules of Court 2012.

The Respondents' Submission

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[7] The main argument advanced by Senior Federal Counsel acting for all the respondents is that the immunities conferred to any former High Officer is limited to act and things done in his capacity as such an officer and not for his personal benefit.

[8] It was further submitted that the said immunities could be waived in situations where such privileges and immunities would impede the course of justice.

[9] The Senior Federal Counsel also contends that the applicant's immunity from any suit or legal process must be tested in the said suit or legal process. All relevant facts would only be revealed in the said suit or legal process which can determine whether the applicant's actions is in relation to the applicant's duties as High Officer of the AIAC or otherwise.

Findings Of This Court

[10] It is settled law that leave may be granted if the applicant can show that there is *prima facie* arguable case and the application is neither frivolous nor vexatious.

[11] In an often-quoted Federal Court case, *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, [2012] 4 MLJ 296, the principle in relation to an application for leave has been explained in the following manner:

> [12] For purposes of its application, the appellant had alluded to the statutory route of O. 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. *At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted* (*IRC v. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 when allowing the appeal, opines that 'the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari*'. Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the *leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome.* A rider must be attached to the application though i.e., unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.
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> (emphasis added)

[12] Reverting to the present application for leave, the main issue is concerning the decision of the Attorney General to charge the applicant for criminal offence. The applicant contends that he has legal immunity from any prosecution and as such the main relief sought in this application is a prohibition order to prevent the Attorney General from charging or bringing any proceedings in court against the applicant.

[13] In this regard, the main issue here is whether the decision of the Attorney General in exercising his discretion to prefer any charges against the applicant is amenable to judicial review.

[14] On this issue, the Federal Court case of *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561 is instructive for reference where the Federal Court has affirmed the decision of the Court of Appeal.

[15] At para. [17] of the case, the reasoning of the High Court was quoted as follows:

> [17] However, on 28.9.2016, the High Court allowed the respondent's application and granted leave to the respondent to commence judicial review proceedings. The High Court held as follows:
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> [19] The submission by the Senior Federal Counsel that 'the decision of the AG belongs to the AG' is untenable.
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> [20] This court is of the considered opinion that the absolute discretion of the respondent (if at all exists) is only pertaining to criminal offences whereas this case involves the discretion or authority of the Respondent in a non-prosecutorial role hence it should not involve an unfettered discretion.

[16] Next, at para. [18], the Federal Court further states:

> [18] The AG then appealed to the Court of Appeal against the decision of the High Court, but the same was dismissed. The Court of Appeal held that:
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> [16] We fully agreed with learned counsel for the respondent on this issue. In *Gouriet*, *supra*, there was a proposed temporary union ban on communications to and from South Africa, which would have been criminal, and yet the Attorney General had refused to sue or lend his name to a relator action, *Gouriet*, *supra* was concerned with the enforcement of the criminal law by way of an injunction in a civil suit. This is not the case with our instant appeal. The respondent herein did not file a suit to enforce the criminal law. His application was for a judicial review on the refusal of the Attorney General to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the Attorney General has unfettered discretion in relation to prosecution of criminal based on Article 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like in this instant appeal.

[17] The Federal Court then at para. [77], states its total agreement with the reasoning of the Court of Appeal as mentioned in para. [18], in the following words:

> [77] Reverting back to our present appeals, we have carefully considered the judgment of the Court Appeal in Appeal No. 58 while keeping in mind the principles of law on the subject as propounded by the Courts in other jurisdiction. We found there was no flaw in its reasoning that the power

of the AG to give or refuse consent under section 9(1) of Act 359 is amenable to judicial review. We are in total agreement with the Court of Appeal's reasoning as alluded to earlier in paragraph 18.

[18] Reading this Federal Court case in totality, undoubtedly that the court acknowledged the unfettered discretion of the Attorney General in relation to prosecution of criminal offences pursuant to art. 145(3) of the Federal Constitution.

[19] The reasonable conclusion from the reasoning of the court in this Federal Court case is that the decision of the Attorney General made in his prosecutorial role is the unfettered discretion of the Attorney General which is not amenable to judicial review.

[20] This finding is also consistent with earlier decisions of the apex courts with regard to the unfettered discretion of the Attorney General to initiate or discontinue any proceedings of an offence pursuant to art. 145(3) of the Federal Constitution.

[21] In the Federal Court case of *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152, Suffian LP emphasised the unfettered discretion of the Attorney General pursuant to art. 145(3) in the following manner:

> On independence the Federal Constitution came into force, and clause (3) of its Article 145 (as amended) provides:
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> > *The Attorney-General shall have power exercise at his discretion to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial*.
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> *Our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he was instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-33 in Smedleys Ltd v. Breed). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature*.
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> **Anyone who is dissatisfied with the Attorney-General's** decision not to prosecute, or not to go on with a prosecution or his **decision to prefer a charge** for a less serious offence when there is evidence of a more serious offence which **should be tried in a higher court, should seek his remedy elsewhere, but not in the courts**.
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> (emphasis added)

[22] Suffian LP re-emphasised the discretionary power of the Attorney General in the case *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 66 as follows:

> As noted by this court in *Long bin Samat v. Public Prosecutor* there was ample judicial authority before Merdeka to show that the Attorney-General enjoyed wide discretion in regard to criminal prosecutions. As section

A 376(i) of the Criminal Procedure Code was already in existence before merdeka our constitution-maker could have been content with relying on it alone to preserve after Merdeka the Attorney-General's pre-Merdeka power, and if they had done so then it might be arguable that after merdeka it must be read subject to article 8; but our constitution-makers were not content to do so. They deliberately wrote article 145(3) into our
B constitution, which reads:

> The Attorney General shall have power, exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a native court or a court-martial.

C The language of this provision is very wide, for it includes the word 'discretion' which means liberty of deciding as one thinks fit.

[23] In the context of the present application, the Attorney General has the unfettered discretion to charge the applicant for criminal offence which this court has no legal power to interfere.
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[24] Further, the Attorney General have the control and discretion of all criminal prosecutions as provided under sub-s. 376(1) of the Criminal Procedure Code which states:

> 376. (1) The Attorney General shall be the Public Prosecutor and shall
E have the control and direction of all criminal prosecutions and proceedings under this Code.

[25] In Singapore, the position is that prosecutorial discretion is subject to judicial review in two situations which are:

F (i) where the prosecutorial power is abused;

(ii) where the exercise of the prosecutorial discretion contravenes constitutional protections and rights.

[26] On this issue, Chan Sek Keong CJ, in the case of *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR 239, said this:
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> The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose it is intended, ie, to convict and punish offenders, and not for an extraneous purpose. As the Court of Appeal said in *Chng Suan Tze v. Minister of Home Affairs* [1988] SLR 132 at 156, [86], all legal powers, even a constitutional power,
H have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law. *In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abuse, ie, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights* (for example, a discriminatory prosecution which results is an accused being deprived of
I his right to equality under the law and the equal protection of the law under art. 12 of the Constitution).
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> (emphasis added)

[27] Even if this position in Singapore were to be followed, there is no material before this court which can show the abuse of the prosecutorial power. Further, the decision of the Attorney General to charge the applicant does not contravene any constitutional protection and rights.

[28] Next, on the issue of the applicant's immunity being the former High Officer of AIAC, it is pertinent to examine the relevant provisions of the law which are the following:

(i) The agreement between the Government of Malaysia and the Asian-African Legal Consultative Organisation relating to the Regional Centre for Arbitration in Kuala Lumpur 2013 where art. III of cl. 6 provides:

> 6. The Director of the Centre, if he is a citizen of Malaysia, shall be entitled to such privileges and immunities as determined by the Minister pursuant to Act 485.

(ii) The Kuala Lumpur Regional Centre For Arbitration (Privileges and Immunities) (Amendment) Regulations 2011, where reg. 3A(3), states:

> (3) A former High Officer shall have the immunities in part II of the Second Schedule to the Act.

(iii) The International Organizations (Privileges and Immunities) Act 1992 (Act 485) where Part II of the Second Schedule provides:

> PART II
>
> IMMUNITIES OF FORMER HIGH OFFICER OF INTERNATIONAL ORGANIZATION
>
> Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

(iv) Act 485, sub-s. 8A(1) states:

> 8A. (1) The privileges and immunities conferred under this Act are granted in the interests of the international organization and overseas organization and not for the personal benefit of the individuals.

[29] Based on the above provisions, it is clear that the immunities conferred do not cover any act done for personal benefit of the individual.

[30] Reverting to the present application, based on the affidavits and documents filed, there are no established facts or evidence for this court to determine as to whether the applicant's action is for his own benefit or otherwise. The evidence, if any, will only be revealed during trial in the court where the applicant is charged with the criminal offence. This court is not privy to the evidence to be produced by the prosecution against the applicant which is pertinent to determine the issue of the applicant's immunity.

[31] As to the issue of waiver of the applicant's immunities, sub-s. 8A(2) of Act 485 provides as follows:

> (2) The appropriate authority of the respective international organization and overseas organization *shall have the right and the duty to waive the privileges and immunities of any of its representatives, officials or experts in any case where, in its opinion, such privileges and immunities would impede the course of justice* and could be waived without prejudice to the interests of the international organization and overseas organization.
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> (emphasis added)

[32] Based on the above provision, I am of the view that an application for waiver of immunities can be made by the relevant parties but the power to waive the immunities in the present case is with AALCO and one of the considerations to be taken by AALCO is whether the immunities would impede the course of justice.

[33] In any event, the Ministry of Foreign Affairs has already sent the letter to AALCO requesting for the waiver of the applicant's immunities and was responded by AALCO's Secretary General by letter dated 22 March 2018 which has decided not to waive the said immunities.

[34] In the circumstances, the issue of waiver of immunities of the applicant has become academic. There is no longer any controversy between parties on this issue which will affect them.

[35] As pointed out by the Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113, on the test whether an issue or matter has become academic in the following words:

> The test therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic.

[36] In a recent Federal Court's decision, *Bar Council Malaysia v. Tun Dato' Seri Arifin Zakaria & Ors And Another Reference; Persatuan Peguam-peguam Muslim Malaysia (Intervener)* [2018] 10 CLJ 129 it states the general principle is that the court does not answer academic questions.

[37] The case of *Sun Life Assurance Co. of Canada v. Jervis* [1944] AC 111 was quoted in this case where the relevant part of Lord Chancellor Viscount Simon views was made reference to by the court which *inter alia* are the following:

> I do not think that it would be a proper exercise of the authority which this House possess to hear appeals if it occupies time in this case in deciding an academic question, *the answer to which cannot affect the Respondent in any way. If the House undertook to do so, it would not be deciding an existing*

lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without any way affecting the position between the parties.

(emphasis added)

[38] In another case quoted by the Federal Court, Lord Bridged in *Ainsbury v. Mallington* [1987] 1 All ER 929, *inter alia* said this:

It has always been a fundamental feature of our Judicial System that the courts decide dispute between the parties before them; they do not pronounce on abstract questions of law when there is no disputes to be resolved.

[39] In the circumstances, the issue of waiver of the applicant's immunities has been resolved by the letter from the Secretary General of AALCO to the Minister of Foreign Affairs dated 22 March 2018.

Conclusion

[40] Based on the aforesaid reasons, I find there is no *prima facie* arguable case in the applicant's application for leave to commence judicial review and the application is frivolous and vexatious. As such, the applicant's application is dismissed with no order as to costs.